

Claimant contends the evidence supports a higher impairment rating than that awarded by ALJ Moore. Claimant also asserts he proved entitlement to future medical benefits. Claimant requests the Board modify the Award.

Respondent, at oral argument, asked the Board to reduce claimant's left shoulder functional impairment to 8%, but to affirm the remainder of the Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The facts and history of this claim are detailed in the Award of ALJ Moore. The Board adopts the Findings of Fact set out therein as its own.

PRINCIPLES OF LAW AND ANALYSIS

Claimant asks the Board to disregard Dr. Erik L. Severud's functional impairment opinion, because he did not consider claimant's distal clavicle resection and allegation of profound left shoulder weakness. Claimant asserts the Award did not address the argument that Dr. Severud disregarded claimant's left shoulder weakness.

ALJ Moore addressed whether Drs. Severud and Edward J. Prostic properly considered claimant's distal clavicle resection when rating his functional impairment by finding:

Here, a significant difference of opinion between Drs. Severud and Prostic, accounting for most of the difference between their respective ratings, is whether the **Guides** contemplate that a 1 cm excision of bone from the end of the distal clavicle is the same as an "arthroplasty." If it is an arthroplasty, a 10% impairment of function pursuant to **Table 27, page 61** of the **Guides** is appropriate. If the distal clavicle excision is not an arthroplasty, the 10% rating from **Table 27, page 61** does not apply. The term "arthroplasty" is not defined in the single page of the **Guides** provided to the court. Dr. Prostic apparently believes a distal clavicle excision is an arthroplasty, while Dr. Severud does not.

As the court is unable to resolve this issue, with the evidence before the court, it will give the rating opinions equal weight, and will find and conclude that **Claimant has suffered a 14% impairment of function to the left upper extremity at the level of the shoulder.**¹

¹ ALJ Award at 7.

The Award did not specifically address claimant's allegation that Dr. Severud did not consider claimant's left shoulder weakness when opining claimant had an 8% left upper extremity functional impairment. Dr. Severud testified there was no reason for claimant to have left shoulder weakness. He also testified that had he suspected an area of weakness, he would have listed it. The doctor differentiated between weakness and pain. Dr. Severud indicated that if claimant has limitations because of pain, it does not mean he has muscle weakness.

The Board concludes that while the Award did not specifically address the allegation that Dr. Severud did not consider claimant's left shoulder weakness, the Board will not disturb ALJ Moore's finding that claimant sustained a 14% functional impairment to the left upper extremity at the level of the shoulder. Dr. Severud's testimony was that if he had detected an area of the body that was weak, he would have noted it. That indicates he believed claimant did not have loss of strength. The medical opinions of Drs. Severud and Prostic were presented as being pursuant to the *Guides*. Based upon the record, the Board finds Dr. Prostic's and Dr. Severud's functional impairment opinions are credible and should be given equal weight. The ALJ's finding that claimant suffered a 14% functional impairment to the left upper extremity at the level of the shoulder is affirmed.

Respondent asserts Dr. Prostic's rating is faulty because he assigned 10% for the distal clavicle resection using Table 27 of the *Guides*.² Table 27 allows that rating to be given only when an arthroplasty is performed. Drs. Severud and Prostic have different views on whether the type of surgery Dr. Severud performed on claimant's left shoulder was an arthroplasty. Therefore, the ALJ correctly gave their opinions equal weight.

Respondent contends Dr. Severud did not perform a left shoulder arthroplasty. Respondent also alleges Dr. Prostic did not follow the requirements of Table 34 in arriving at his impairment rating for strength loss. The Board finds ALJ Moore correctly ruled on respondent's argument when he stated in the Award:

Respondent contends that Dr. Prostic's rating should be disregarded because it is not clear that he followed the **Guides** in arriving at his rating for loss of strength. Dr. Prostic based his loss of strength rating on **Table 34** of the **Guides**. That table is not in evidence, and Dr. Prostic was not questioned about his methodology at deposition. Where Dr. Prostic said he relied upon the **Guides** in arriving at his opinions, and where Respondent failed to adduce evidence that Dr. Prostic failed to follow the rating criteria of the **Guides**, the court will conclude that Dr. Prostic's rating for loss of strength should be considered.³

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ ALJ Award at 7.

The next issue is whether claimant sustained his burden of proof necessary to overcome the statutory presumption to terminate respondent's obligation to provide future medical care for claimant's left shoulder injury. Drs. Severud and Prostic agreed claimant will need future medical treatment for his left shoulder. Dr. Prostic attributed claimant's need for future medical treatment to his work injury.

Dr. Severud indicated claimant potentially would need Synvisc injections in the future, but testified, "[I]t would be more probable than not that the preexisting condition would be the prevailing factor in leading to significant osteoarthritis and the need for future treatment."⁴ However, Dr. Severud's March 13, 2012, notes recommended a Synvisc One injection and stated, "At this point, I think that the prevailing factor for the continued symptoms is related to the injury and therefore would request doing a Synvisc injecti [sic]."⁵ Later that month, Dr. Severud gave claimant an injection of Synvisc One.

K.S.A. 2011 Supp. 44-510h(e) provides in relevant part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Award states:

Applying this provision [referring to the above section of K.S.A. 2011 Supp. 44-510h(e)] to the facts of the case at bar, Respondent is entitled to a presumption that the right to future medical care terminated when Claimant achieved maximum medical improvement. To overcome that presumption, Claimant must demonstrate that it is "**more probably true than not that additional medical treatment will be necessary**" in the future. Implicit in the statute is the requirement that the work injury is the prevailing factor in the need for such additional treatment. This conclusion is buttressed both by common sense and by reference to the statute governing post-award medical treatment. Clearly, the legislature, when addressing

⁴ Severud Depo. at 13.

⁵ *Id.*, Ex. 4.

the issue of future medical, intended to provide for medical care for the care and treatment of the work injury, not a collateral and unrelated condition. . . .⁶

The Award cites K.S.A. 2011 Supp. 44-510k(a)(2), which provides that when an application for post-award medical has been filed the ALJ may:

(A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

The Award concludes claimant will need future medical treatment, but states, **“Claimant has failed to sustain his burden of proof necessary to overcome the statutory presumption that the employer’s obligation to provide medical care for the July 1, 2011 work injury has terminated.”**⁷

K.S.A. 2011 Supp. 44-510h(e) states the presumption to terminate medical benefits may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as claimant reaches maximum medical improvement. There is no requirement in K.S.A. 2011 Supp. 44-510h(e) that, at the time the award is entered, claimant must prove it is more probably true than not that the injury is the prevailing factor in the need for future medical care and that future medical care is necessary to cure or relieve the effects of such injury. Those requirements are set forth in K.S.A. 2011 Supp. 44-510k(a)(2)(A). The Award erroneously requires claimant to meet the requirements set forth in K.S.A. 2011 Supp. 44-510k(a)(2)(A), a section of the post-award medical statute, in order to be entitled to future medical benefits. Utilizing the post-award medical statute requirement that the injury in the underlying award is the prevailing factor in the need for further medical care is premature application of the statute.

Here, Drs. Severud and Prostic indicated claimant would need future medical treatment. That meets claimant’s burden, as required by K.S.A. 2011 Supp. 44-510h(e), of proving with medical evidence that it is more probably true than not that he will need additional medical treatment in the future. Therefore, the Board finds claimant is entitled to future medical benefits upon proper application to the Director. Of course, claimant will

⁶ ALJ Award at 8.

⁷ *Id.* at 9.

be subject to the mandates of K.S.A. 2011 Supp. 44-510k in any pursuit of additional medical treatment related to this accidental injury.

CONCLUSION

1. Claimant sustained a 14% functional impairment to the left upper extremity at the level of the shoulder.

2. Claimant is entitled to future medical benefits upon proper application.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 26, 2013, Award entered by ALJ Moore by finding claimant is entitled to future medical benefits upon proper application. The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁸ K.S.A. 2012 Supp. 44-555c(k).

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Honorable Bruce E. Moore, Administrative Law Judge